

1 **BEFORE THE POLLUTION CONTROL HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 **WASHINGTON CHEMICAL, INC.,)**
4 **Appellant.)** **PCHB Nos. 90-87 and**
5 **v.)** **91-12**
6 **STATE OF WASHINGTON,)** **FINAL FINDINGS OF FACT,**
7 **DEPARTMENT OF ECOLOGY,)** **CONCLUSIONS OF LAW AND**
8 **Respondent.)** **ORDER**
9 _____)

10 Washington Chemical, Inc. (WCI) appealed the Department of Ecology's (Ecology)
11 Order No. DE 90-E711 and Ecology's Notice of Disposition Upon Application for Relief from
12 Penalty No. DE 90-E707 (\$90,000) which allege violations of WCI's dangerous waste storage
13 facility permit and the dangerous waste regulations, Ch. 173-303 WAC. The appeals were
14 consolidated.

15 The hearing on the merits was held on June 7-9, 1993 in Spokane, Washington.
16 Present for the Pollution Control Hearings Board on all three days were the Presiding Officer
17 Administrative Law Judge John Buckwalter and Board Member Richard Kelley, also present
18 on June 7 and 8 was Board Chairman Hal Zimmerman. Subsequent to the hearing on the
19 merits Chairman Zimmerman reviewed the tapes of the portion of the hearing conducted on
20 June 9, 1993.

21 Appellant WCI was represented by attorneys Brian Rekofke and Leslie Weatherhead
22 (Witherspoon, Kelley, Davenport & Toole) Respondent Ecology was represented by Assistant
23 Attorney General Mary Sue Wilson and Lori Lebon of the Attorney General's Office. Court
24

1 Reporter Randi Hamilton (Gene Barker and Associates of Olympia) took the proceedings on all
2 three days of the hearing.
3

4 Prior to the hearing Respondent Ecology submitted a Motion in Limine requesting that
5 the admission of several documents identified as proposed exhibits by WCI be precluded.
6 Ecology's Motion in Limine also requested that the Board exclude testimony from seven
7 witnesses identified as proposed witnesses by WCI. The Board took the Motion under
8 advisement and ruled on Ecology's requests during the course of the hearing.

9 During the hearing witnesses were sworn and testified, and exhibits were admitted and
10 examined. Following the hearing, post-hearing briefs and proposed findings and conclusions
11 were filed and reviewed by the Board as part of the appeal record.

12 From the testimony, evidence and contentions of the parties, and having conferred, the
13 Board makes these:

14 FINDINGS OF FACT

15 I.

16 Washington Chemical, Inc (WCI) is a facility located in Spokane that engages in the
17 recycling and storage of dangerous waste. WCI operates as a permitted "TSD" (treatment,
18 storage, or disposal facility) pursuant to its dangerous waste facility permit.
19 WCI's business involves picking up and transporting drums of dangerous waste to its facility,
20 treating or recycling the contents of some of these drums to recover usable products, storing
21 dangerous waste at its facility, and ultimately sending the dangerous waste that it stores and
22 generates to off-site disposal facilities. WCI treats the contents of these drums it receives from
23 its customers to recover usable products including solvents such as perchlorethylene and 1-1-1
24 trichlorethane. The chemical products are recovered, put into clean drums, and sold to various
25 consumers. The material remaining in the drums, sometimes referred to as still bottoms or

1
2 sludges, are collected in drums, stored at the facility for some time, and ultimately sent to
3 another dangerous waste treatment or disposal facility. WCI's permit allows WCI to store
4 dangerous waste in one of two specifically designated storage areas, an area inside a
5 warehouse on the facility (the "inside storage area") and an area located outside the warehouse
6 on a concrete pad (the "outside storage area")

7 II.

8 The State of Washington Department of Ecology (Ecology) is a state agency with
9 statutory responsibility for implementing and enforcing the State's dangerous waste laws,
10 including issuing TSD facility permits and conducting inspections to insure compliance with
11 such permits.

12 III.

13 On January 11, 1990 a WCI employee combined two different types of wastes in one
14 55 gallon drum and then placed the container in the outside dangerous waste storage area at the
15 facility. Within minutes the waste mixture created a chemical reaction that resulted in the
16 drum exploding. The drum launched from the outside containment area, clearing WCI's
17 perimeter fence, and landed on Queen Street in front of WCI's warehouse. The contents of the
18 drum, a dangerous waste paint mixture, were sprayed into the air, over and onto adjacent
19 drums, the storage area, the facility's fence, an employee's car, and soils both inside and
20 outside the facility.

21 IV.

22 At the time of the drum explosion, Mr. Charles Humphrey, an employee of Jaffco
23 Trucking, a business located at an angle across Queen Street from WCI, was walking outside
24 of Jaffco's premises when he heard a loud explosion. He turned toward WCI's facility and
25

1 saw a barrel flying about 40 feet in the air He saw the barrel land on Queen Street and he
2 witnessed several WCI employees retrieve the barrel and carry it back into the WCI facility
3

4 V

5 Mr. Jerry Fowler, an employee of WCI in 1989 and 1990, worked as a truck driver for
6 the company, delivering and picking up loads of chemicals and dangerous wastes for WCI's
7 customers. On the day of the drum explosion, Mr. Fowler returned to the facility after
8 completing his deliveries, and found that his car, which was parked outside of the facility's
9 perimeter fence, was covered with a maroon colored material. Mr. Fowler also observed the
10 same maroon colored material on the fence at the facility and on the ground at the facility,
11 covering an area of approximately 50 to 60 yards in length. Mr. Fowler observed other WCI
12 employees raking the ground to remove the material from the soil. Mr. Fowler observed that
13 the material was sticky to touch and smeared on his car when WCI employees attempted to
14 remove the substance with rags. Mr. Fowler took his automobile to a car wash to be cleaned

15 VI.

16 An investigation conducted by Mr Rick Mattausch, WCI general manager, and Mr
17 Donn Herron, owner and president of WCI, confirmed that some kind of incompatible
18 substances ended up in the same drum and caused the drum to rupture. WCI made a notation
19 regarding the exploding drum incident in its "operating record," but took no further actions
20 WCI did not at any time report the exploding drum incident to Ecology or to any other
21 emergency response agency WCI did not implement its contingency plan WCI did not make
22 any notation in its daily container inspection log for January 11, 1990 reflecting the exploding
23 drum incident. In fact, the January 11, 1993 entry for the container storage area inspection
24 log indicated that all containers were "acceptable" and made no reference to the exploding
25 drum incident. No security devices daily inspection was documented for

1
2 January 11, 1990

3 VII.

4 WCI's contingency plan, which is attachment 4 to WCI's Permit, provides, in part:

5 The basis for decision to implement the Contingency Plan by the
6 ERC [Emergency Response Coordinator] is based on whether there
7 is an imminent or actual emergency that could threaten health or the
8 environment.

9 Under the plan provision entitled "Implementation," the contingency plan further
10 provides:

11 The contingency plan will be immediately implemented whenever
12 there is a release, fire or explosion. The ERC will immediately
13 identify the nature, source, location, amount, and area affected by
14 release by observation, records at facility, manifest, or chemical
15 analysis.

16 The ERC, in selecting available methods of implementation, must
17 consider both immediate effects of fire, explosion or spill and
18 secondary effects that may follow from corrective action, such as
19 surface water runoff from fire control.

20 (Emphasis ours.)

21 VIII.

22 The Contingency Plan allows for various levels of implementation, depending upon the
23 seriousness of the situation. At a minimum, the plan requires a notation in the facility's
24 operating record regarding the details of the incident, followed by a written report within
25 fifteen (15) days to Ecology's Eastern Regional Office. In September 1987 Ecology sent WCI
26 a letter indicating: "Implementing the Contingency Plan requires the submission of a written
27 report to Ecology "

IX.

In mid-February an anonymous person called Ecology and reported the exploding drum incident. On March 1, 1990, Mr. Bruce Howard, a dangerous waste inspector from Ecology arrived at WCI in the middle of the day to conduct an unannounced inspection. When Mr Howard arrived, WCI's owner was not present at the facility so WCI's general manager at the time, Mr. Rick Mattausch, escorted Mr Howard around the facility.

X.

During his inspection on March 1, 1990, Mr. Howard observed dried maroon colored material on some of the drums in the outside storage area and on the fence adjacent to the outside storage area. Mr. Howard learned that this was the material that had been released from the exploding drum in January.

XI.

Mr Howard testified that during the inspection Mr. Mattausch told him that all the drums located in the inside and outside dangerous waste storage areas contained dangerous waste. During the hearing Mr. Mattausch first testified that he could not recall whether he had made such a statement to Mr. Howard, later during his testimony Mr. Mattausch testified that he did not believe that he would have made such a statement, still later he testified that he had not made that statement.

XII

At the time of the inspection, a number of drums in both the inside and outside dangerous waste storage areas were not covered and were not being worked on by any WCI personnel. Mr Howard took photographs of a number of these drums. One photograph shows that at least two drums were full of dangerous waste, and one of the full drums contains a yellow hazardous waste sticker, but were not covered. Mr. Howard was at the WCI facility

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2 for approximately one hour. During that time no WCI employees were observed working on
3 any of these open drums.

4 XIII.

5 At the time of the March 1, 1990, inspection, a large number of drums of dangerous
6 waste in both the inside and outside storage areas were not labeled. A number of drums also
7 had obscured or illegible labels. Mr. Howard walked around groups of drums and was unable
8 to locate or read labels on a number of drums. Mr. Howard took photographs of a number of
9 these drums. Several of these photographs show paint waste from the January drum explosion
10 splattered over the yellow hazardous waste labels affixed to a number of drums. No WCI
11 employees were observed working on any of the drums that were unlabeled or had obscured
12 labels.

13 XIV

14 At the time of the March 1, 1990, inspection, batches of drums, three or more deep in
15 some instances, were arranged such that not all drums were directly accessible. The aisle
16 space in both the inside and outside storage areas would not have allowed for the unobstructed
17 movement of personnel, fire protection equipment or spill control equipment. Mr. Howard's
18 photographs show that a number of drums could not be reached because they were completely
19 surrounded by other drums. During his inspection Mr. Howard did not observe any WCI
20 employees working on any of the drums that were inaccessible.

21 Attachment 6 ("Container Management Practices") indicates that "major aisles" in the
22 storage area must be at least three feet wide. Attachment 6 depicts drum configurations in
23 which drums are no more than two deep or two high. On March 1, 1990, the drums in the
24 inside and outside storage areas were not configured consistent with the configurations
25 depicted in WCI's permit, attachment 6.

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2 XV.

3 During his inspection, Mr. Howard noticed a blue trailer located outside of and behind
4 the facility warehouse. Mr. Howard requested that Mr. Mattausch open the trailer. After
5 some hesitation from Mr. Mattausch, the trailer was opened. Mr. Howard immediately
6 smelled the pungent, distinctive solvent odor of perchlorethylene. Mr. Howard observed
7 approximately one hundred (100) filters in the blue trailer. None of these filters bore
8 hazardous waste labels.

9 XVI.

10 As a dangerous waste inspector Mr. Howard has had occasion to visit dry cleaning
11 facilities that utilize perchlorethylene. As a result, Mr. Howard has become familiar with the
12 distinctive odor of perchlorethylene and was able to identify its pungent odor as soon as the
13 trailer doors were opened. Mr. Howard did not enter the trailer to remove samples for testing
14 for perchlorethylene because he did not have the proper safety clothing or equipment. He did
15 not, at any subsequent time, return to the site to remove a sample.

16 XVII.

17 Perchlorethylene is an "F-listed" dangerous waste. It is a chemical compound known
18 for its toxicity and persistency in the environment, and its carcinogenic properties. Westco
19 Apparel Service v. Ecology, PCHB No. 85-164 (4/23/86)

20 XVIII.

21 Mr. Jerry Fowler, a truck driver for WCI, was instructed by his supervisors at WCI to
22 use his senses of sight and smell to confirm that the chemicals he picked up from WCI's
23 clients matched the paperwork accompanying the chemicals. Essentially, Mr. Fowler used his
24 senses of sight and smell to "red flag" discrepancies between chemicals received and the
25 accompanying paperwork. On more than one occasion during his tenure at WCI, Mr. Fowler

1 had "red-flagged" chemicals that did not match their paperwork and had successfully prevented
2 WCI's acceptance of those chemicals.
3

4 Mr. Fowler was able to differentiate between dry cleaning filters containing mineral
5 spirits and filters containing perchlorethylene based upon their smell and their weight Mr
6 Fowler indicated that mineral spirit filters had a mild turpentine smell compared to
7 perchlorethylene filters that gave off a noticeably offensive odor. Perchlorethylene filters were
8 much heavier in weight than mineral spirit filters.

9 XIX.

10 Upon arriving at WCI with a load of used filters, Mr. Fowler would be directed by
11 WCI supervisors where to unload the filters and sometimes he would be directed to move
12 items between locations within the facility. In early 1990, Mr. Fowler, as directed, placed
13 approximately 50 to 60 dry cleaning filters in a blue trailer at the facility. This trailer was not
14 located in either of the designated dangerous waste storage areas. Mr. Fowler testified that
15 about 40 to 50 of the filters that he placed in the trailer contained perchlorethylene. He based
16 this determination upon his observations regarding the smell and weight of the filters he placed
17 in the trailer.

18 XX.

19 Mr. Herron, the president of WCI, telephoned Mr. Howard on March 2, 1990, the day
20 after Mr. Howard's inspection. Mr. Howard prepared a telephone log recording this
21 conversation. At least two topics were discussed, the January exploding drum incident, and
22 the dry cleaning filters in the trailer.

23 Regarding the drum incident, Mr. Herron indicated that an employee had mixed
24 urethane compounds, the resulting heat and pressure "blew the lid," and "the top and the drum
25 went over the fence." However, Mr. Herron told Mr. Howard that it was "not a contingency

1 plan situation." Mr. Herron told Mr. Howard that he did not know whose waste was
2 involved.
3

4 Mr. Howard indicated that the filters located in the blue trailer needed to be properly
5 contained and shipped off-site as soon as possible. Mr. Herron agreed and promised to send
6 copies of manifests involved. On April 1, 1990 WCI sent a shipment of dry cleaning filters
7 offsite manifested as a dangerous waste, referencing F002, the dangerous waste code number
8 for perchlorethylene. WCI provided a copy of this manifest to Ecology, indicating that this
9 manifest included the filters from the trailer. On April 27, 1990 Mr. Herron signed an
10 affidavit in which he referenced the filters that were being stored in the trailer, and indicated
11 that the "filters were of at least two different types of waste characteristics." R-13, ¶¶ 32-33

12 During the hearing, Mr. Herron contended that all the filters stored in the trailer had
13 been mineral spirit filters. According to Mr. Herron, the mineral spirit filters (from the trailer)
14 had been combined with perchlorethylene filters (apparently from a permitted dangerous waste
15 storage area) for shipment off-site, thus explaining the manifest reference to F002.

16 XXI.

17 WCI is required to conduct and document conducting the following types of
18 inspections: (1) monthly safety equipment inspection, (2) weekly safety equipment inspection.
19 (3) weekly container storage area inspection, (4) daily container storage area inspection, (5)
20 daily security devices inspection, and (6) weekly security devices/operating and structural
21 equipment inspection Mr. Mattausch, WCI's general manager between January and March
22 1990, was responsible for conducting and recording these inspections.

23 XXII

24 At the conclusion of the March 1, 1990 inspection Mr. Howard requested that he be
25 shown WCI's inspection logs. Mr. Mattausch showed Mr. Howard the monthly safety

1 equipment inspection log, the weekly safety equipment inspection log, the weekly container
2 storage area inspection log, the daily security devices inspection log and indicated that the
3 daily container storage area inspection log was on Mr. Herron's desk. The last entry for the
4 monthly safety equipment inspection log was January 31, 1990; the last entry for the weekly
5 safety equipment log was February 16, 1990; the last entry for the weekly container storage
6 area log was February 9, 1990; and the last entry for the monthly security devices log (that
7 requires daily entries) was January, 1990.
8

9 XXIII.

10 As of March 1, 1990 all required inspection logs were not current. Several weekly
11 logs were two to three weeks behind. One daily log was a month behind.

12 XXIV.

13 Between 1982 and 1989, Ecology took at least seven formal enforcement actions
14 against WCI. These actions involved drum management, storage, training, and inspection
15 violations.

16 XXV.

17 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.
18 From these Findings of Fact the Board makes these:

19 CONCLUSIONS OF LAW

20 I.

21 This Board has jurisdiction to review penalties and orders issued by Ecology RCW
22 43.21B.300, .310. This Board makes two determinations when reviewing penalties. (1)
23 whether the alleged violations occurred; and, (2) whether the amount of the penalty is
24 reasonable. Washington Chemical, Inc. v Ecology, PCHB Nos. 85-25, 85-26, 85-116, and
25 85-117 (1985). Hearings before the Board are de novo, WAC 371-08-183(2), and Ecology

1 has the burden of proving that the violations occurred and that the penalty is reasonable.

2 Protan Laboratories v. Ecology, PCHB No. 86-20 (6/24/86).

3 II.

4 In determining the reasonableness of the amount of the penalty the following factors are
5 considered: (1) the nature of the violation; (2) the prior behavior of the violator; and (3)
6 actions taken to solve the problem that resulted in the enforcement action in the first place.

7 Washington Chemical, Inc. v Ecology, PCHB Nos. 85-25, 85-26, 85-116, and 85-117
8 (1985).

9 III.

10 During the course of the hearing, a number of exhibits were offered for admission by
11 WCI. For the purpose of discussing our rulings with respect to these documents, we break
12 them into four categories: (1) documents containing factual information not related to the
13 violations at issue in this appeal (Field notes of Bruce Howard dated June 12 and 13, 1989,
14 Proposed A-35); (2) documents containing WCI's arguments made during the course of
15 Ecology's internal penalty mitigation process (WCI's Application for Relief dated April 26,
16 1990, Proposed A-15); (3) documents containing Ecology staff opinions and recommendations
17 regarding the taking of enforcement action (Recommendation for Enforcement Action dated
18 March 30, 1990, Proposed A-11), the amount of penalty to be assessed, or the reasons for
19 recommended withdrawal of particular violations or mitigation of the penalty (December 18,
20 1990 Memorandum from Bruce Howard to Tom Eaton, Proposed A-37), and (4) Ecology's
21 enforcement guidelines which include guidelines regarding penalty assessments (August 8,
22 1989 Revised Dangerous Waste Enforcement Guidelines, Proposed A-36).

23 The recipient of a dangerous waste penalty may elect to seek mitigation from Ecology
24 before appealing to this Board. RCW 43.21B.300(1). Ecology's internal mitigation process is
25

1 not an adjudicative proceeding. See RCW 43.21B.240. Neither the facts presented nor the
2 arguments made during Ecology's internal mitigation process are in any way binding upon this
3 Board which conducts a de novo hearing. WAC 371-08-183(2).
4

5 Ecology originally issued WCI a penalty citing violations arising out of a June 1989
6 inspection, as well as the January 1990 exploding drum incident and the March 1990
7 inspection. WCI submitted an application for relief to Ecology. Thereafter Ecology issued its
8 Notice of Disposition regarding WCI's Application for Relief which withdrew all violations
9 allegedly arising out of the June 1989 inspection and reduced the penalty amount to \$90,000

10 IV

11 To the extent that the documents identified in categories one and two above contain
12 facts related to violations that were alleged to have occurred in June 1989 but were later
13 withdrawn by Ecology and are not at issue in this appeal, such documents are not admissible
14 because they are not relevant as to whether the violations at issue in this case (those that are
15 alleged to have occurred in January and March 1990) did in fact occur. Moreover, the same
16 facts, because they relate only to alleged violations that have since been withdrawn, are also
17 not relevant to the issue of the reasonableness of the penalty. For these reasons, admission of
18 these documents was denied.

19 V.

20 The documents identified in categories two, three, and four above contain arguments
21 raised by WCI during the mitigation process, internal recommendations made by Ecology staff
22 to their supervisors regarding the disposition of WCI's mitigation request, or Ecology's
23 internal penalty assessment guidelines. This information is not relevant to the Board's
24 determinations regarding whether the alleged violations occurred or whether the penalty
25 amount is reasonable. Because the Board's determination is de novo, WAC 371-08-183(2),
26

1 the Board's determination is completely independent from Ecology's penalty assessment
2 process and mitigation determination. Therefore, any facts presented and arguments made
3 during the course of the penalty assessment or mitigation process are not relevant to the
4 Board's determinations. In addition to not being relevant, exclusion of such documents is also
5 supported by ER 403 because presentation of this information serves only to confuse the
6 relevant issues and result in an unnecessary waste of time. For these reasons, admission of
7 these documents was denied.
8

9 VI.

10 Ecology's Motion in Limine also requested that testimony from various witnesses
11 identified by WCI be excluded. These proposed witnesses were all current or past Ecology
12 employees (Paul Sonnenfeld, Marc Horton, Tim Nord, Deborah Cornett, Douglas Dunster,
13 John Arnquist, and Claude Sappington) In WCI's oral response to Ecology's motion, WCI
14 did not allege that any of these individuals had any personal knowledge regarding the January
15 and March 1990 events at WCI that gave rise to the penalty at issue. WCI stated that it
16 intended to present testimony from these individuals to discuss Ecology's policies and manuals
17 regarding enforcement actions, including penalty assessment guidelines. Testimony from these
18 proposed witnesses is excludable both because each potential witness lacked personal
19 knowledge regarding the relevant issues in this case. ER 602, and because testimony relating
20 to Ecology's internal policies and guidelines relating to the taking of enforcement actions or
21 imposition of penalties is not relevant in light of the de novo character of this Board's process
22 For these reasons, presentation of these witnesses by WCI was denied.

23 VII.

24 WCI's permit requires that the facility be operated to minimize the possibility of
25 explosions or any unplanned sudden release of dangerous waste constituents to the
26

1 environment. Permit Condition B.1. Applicable dangerous waste regulations prohibit the
2 mixing of incompatible wastes such that the wastes generate extreme heat or pressure, fire or
3 explosion, or violent reaction or such that the wastes damage the structural integrity of the
4 device in which they are contained. WAC 173-303-395(1)(b); WAC 173-303-630(9)(a) We
5 conclude that WCI violated the prohibition against mixing incompatible wastes when the
6 company mixed two wastes on January 11, 1990 which resulted in an explosive chemical
7 reaction.
8

9 VIII.

10 Violations and penalties under the dangerous waste statute, ch. 70.105 RCW, are
11 assessed on a strict liability basis. Comet Trailer Corp. v Ecology, PCHB No 85-151 & 85-
12 159 (8/4/86). Therefore, arguments regarding intent or negligence are not relevant to the
13 Board's determination regarding whether a violation occurred. The degree of care exercised
14 by a facility may be relevant in determining the reasonableness of the penalty Therefore,
15 WCI's contention that the exploding drum was the result of a third party's mistake, as opposed
16 to WCI's negligence, is discussed below in the context of the reasonableness of the penalty

17 IX.

18 WCI's Contingency Plan requires that the plan be implemented whenever there is a
19 release, fire or explosion at the facility. In such instances the discretion that is vested with the
20 ERC goes to the degree or level of implementation. The plan references available methods of
21 implementation and various factors that should be considered in selecting the level of
22 implementation. However, in all cases the minimum requirements are a notation in the
23 operating record and a follow up written report to Ecology.
24
25
26

1
2 X.

3 This construction of the contingency plan provision of WCI's permit is appropriate in
4 light of the nature of the dangerous waste regulatory scheme which relies upon a "self-
5 implementing" permit because most information relating to facility operations is within the
6 control of facility personnel. If reporting of incidents such as the exploding drum incident at
7 WCI was not required, Ecology would be powerless to insure that a facility has appropriately
8 responded to an emergency situation, including taking all appropriate follow-up actions to
9 insure that such an incident does not occur again, and to insure that any environmental harm
10 has been remediated. We conclude that WCI violated its Permit when it failed to implement
11 the Contingency Plan in response to the January 11, 1990 exploding drum incident.

12 XI.

13 At the time of the exploding drum incident, WAC 173-303-145(1) applied to

14 any dangerous waste or hazardous substance [that] is intentionally
15 or accidentally spilled or discharged into the environment (unless
16 otherwise permitted) such that public health or the environment are
17 threatened, regardless of the quantity of dangerous waste or
hazardous substance.

18 (Emphasis ours) WAC 173-303-145(2)(a) mandated that the person responsible for the spill
19 or discharge notify Ecology

20 Nothing in this section or any other section of the dangerous waste regulations or
21 WCI's permit limit this reporting requirement to a particular quantity. Therefore, we conclude
22 that WCI was required to give Ecology notice of the explosion under WAC 173-303-145
23 Again, WCI admitted that dangerous waste was sprayed from the exploding drum into the air
24 and onto soils both inside and outside the facility This release presented a very real threat to

1 public health and the environment. We conclude that WCI violated WAC 173-303-145(2)
2 when it failed to immediately notify Ecology regarding the exploding drum incident.
3

4 XII.

5 WCI's permit and the applicable dangerous waste regulations set forth standards for the
6 management of drums of dangerous waste that are stored at the facility. WCI contends that it
7 need not be in compliance with various drum management requirements when a batch of
8 drums are in the "custodial care" of an employee. WCI's contention must be rejected for two
9 reasons. First, as the consequence of periodic non-compliance played out by the drum
10 explosion incident demonstrates, the purposes of the drum management requirements demand
11 compliance at all times. Second, WCI's description of "custodial care" is completely
12 unworkable. According to WCI, a "batch" of up to a dozen drums can be in the custodial care
13 of an employee who has the freedom to depart from his work on those drums to attend to other
14 tasks for an hour or more.

15 Permit Condition C.8. and WAC 173-303-630(5)(a) require that all containers "holding
16 dangerous waste always be closed, except when it is necessary to add or remove waste." We
17 conclude that this requires drums containing dangerous waste to be kept closed unless an
18 employee is engaged in the active transfer of waste between drums, and that on March 1, 1990
19 WCI violated Permit Condition C.8. and WAC 173-303-630(5)(a) when drums containing
20 dangerous waste that was not being actively transferred were left open.

21 XIII.

22 Permit Condition B.8.d. and WAC 173-303-340(3) provide:

23 The owner or operator must maintain aisle space to allow the
24 unobstructed movement of personnel, fire protection equipment,
25 spill control equipment, and decontamination equipment to any area
26 of facility operation in an emergency, unless it can be demonstrated

1 to the department that aisle space is not needed for any of these
2 purposes.

3 This provision is applicable at all times unless it can be demonstrated that a particular
4 scenario or activity does not require aisle space. At WCI, work on a "batch" of drums (up to
5 a dozen) may take a couple of hours or a couple of days. During either time period, aisle
6 space may be required for the unobstructed movement of personnel, fire protection equipment,
7 spill control equipment, and decontamination equipment. Therefore, adequate aisle space must
8 be maintained at all times in the inside and outside storage areas.

9 We conclude that WCI violated Permit Condition B.8.d. and WAC 173-303-340(3) on
10 March 1, 1990 when it failed to maintain adequate aisle space throughout the inside and
11 outside storage areas.

12 XIV.

13 Permit Condition C.6. and WAC 173-303-630(3) requires:

14 The owner or operator must label containers in a manner which
15 adequately identifies the major risk(s) associated with the contents
16 of the containers for employees, emergency response personnel and
17 the public The owner or operator must affix labels upon
18 transfer of dangerous waste from one container to another .
19 The owner or operator must ensure that labels are not obscured,
20 removed, or otherwise unreadable in the course of inspection
21 required under WAC 173-303-320.

22 These provisions require that labels be affixed onto a drum as soon as dangerous waste
23 is put into such drum. A facility cannot wait until filling is complete, especially when filling
24 may take several hours or several days. The purposes of this labelling requirement is to
25 inform facility personnel and outsiders as to the contents of drums and any associated risks.
26 The need to know this information arises as soon as waste is placed into a container. A
27

1 facility's internal tracking system cannot substitute for this labelling requirement, especially
2 when the facility admits that the internal system is useless to an outsider
3

4 We conclude that WCI violated Permit Condition C.6 and WAC 173-303-630(3) when
5 it failed to ensure that all drums containing dangerous waste were properly labeled. These
6 provisions also were violated when WCI did not correct or replace labels that were obscured
7 by paint waste from the January explosion and when WCI allowed drums to be configured in
8 such a manner so as to preclude locating or reading labels.

9 XV

10 WCI's permit limits storage of dangerous waste to only two dangerous waste storage
11 areas, the inside and the outside storage areas. Storage of dangerous waste outside of these
12 two areas constitutes a violation of the facility's permit.

13 Two DOE witnesses, Mr. Howard and Mr. Fowler, based upon their olfactory and
14 weight observations, concluded that some of the filters in the blue trailer, which was outside
15 the two designated areas, contained perchlorethylene. Their contested testimony was
16 corroborated to some extent by WCI's actions and alleged statements during and after the
17 inspection and by WCI's action in manifesting the filters under the perchlorethylene dangerous
18 waste code. However, DOE took no samples of the filters for chemical analysis either during
19 the inspection or thereafter, as it could have done. We conclude that DOE did not present the
20 best evidence it could have and has failed to meet its burden of proof that WCI violated Permit
21 Condition C.3 and attachment 6 by storing perchlorethylene dry cleaning filters in an area on
22 its facility not permitted as a designated storage area.

23 XVI

24 Violations that involve releases and threatened releases of hazardous substances to the
25 environment are serious. Westco Apparel Service v. Ecology, PCHB No. 85-164 (4/23/86)

1
2 It is the potential harm to the environment that the dangerous waste regulatory scheme is
3 designed to protect against. Ross Electric of Washington v. Ecology, PCHB No 86-225
4 (2/7/89). Multiple days of continuing serious violations justify substantial penalties. Each day
5 WCI was out of compliance with its permit or a regulation constitutes a separate violation.
6 See Northwest Processing, Inc. v. Ecology, PCHB Nos. 89-141 & 142 (7/18/91). The
7 exploding drum incident is a violation involving releases of hazardous substances to the
8 environment. Such violations justify a substantial penalty.

9 XVII.

10 WCI's permit and the applicable dangerous waste regulations require that facility
11 personnel keep records of required daily, weekly, and monthly inspections. See Permit
12 Condition B.5.; WAC 173-303-380. We conclude that WCI was in violation of this
13 requirement as of March 1, 1990 when at least three of its required logs (the weekly safety
14 equipment log, weekly container storage log, daily security devices log) were not current.

15 XVIII.

16 WCI's permit and the applicable dangerous waste regulations require that the facility
17 conduct certain daily, weekly, and monthly facility inspections. See Permit Condition B.5.;
18 WAC 173-303-320.

19 Based upon the absence of entries in the inspection logs and the status of the facility on
20 the date of the inspection (open drums, unlabelled and inadequately labeled drums, including
21 labels that were illegible because they were covered by material discharged in January, and
22 lack of adequate aisle space in the drum storage area), we conclude that WCI did not conduct
23 all required inspections in January and February 1990. We also conclude that any inspections
24 that were conducted were not performed adequately. For these reasons, we conclude that WCI

1 violated Permit Condition B.5. and WAC 173-303-320 when it failed to conduct required
2 inspections.
3

4 XXIV.

5 WCI's permit and the applicable dangerous waste regulations require that the facility
6 report all instances of noncompliance with its permit to Ecology. Permit Condition A.18 We
7 conclude that WCI violated this provision by not reporting each of the violations noted
8 previously.

9 XXV.

10 A facility's past history is one of the factors considered in our determination regarding
11 the reasonableness of a penalty.

12 Between 1982 and 1989 Ecology took at least seven formal enforcement actions against
13 WCI. These actions involved drum management, storage, and inspection violations, the same
14 categories of violations which occurred in early 1990 in this case. We conclude that WCI's
15 continued inability to comply with permit and regulatory requirements, particularly when the
16 resulting violations are serious, justifies a substantial penalty.

17 XXVI.

18 In light of the fact that the violations which occurred were serious in nature and
19 continued over multiple days and weeks in some instances, the violations could have supported
20 a much larger penalty.

21 XXVIII.

22 The violations that occurred at WCI in January, February and March 1990 were serious
23 violations. The fact that a significant explosion at the facility that impacted areas outside the
24 facility went unreported by the company suggests a significant lack of appreciation regarding
25 the seriousness of the situation. Continued drum management violations, such as failure to
26

1 label drums of dangerous waste, may have been at least partially responsible for the exploding
2 drum incident. WCI contends that the responsibility for the exploding drum incident lies with
3 the paint waste generator that sent an inadequately labelled drum to WCI. While this
4 generator's lack of care may have contributed to the incident, we are not convinced that WCI's
5 poor drum management practices were not also responsible for this incident.
6

7 Failure to timely conduct required inspections shows the same significant failure to
8 meet WCI's obligations under its permit and the dangerous waste regulations.

9 Each of these reasons alone would justify a substantial penalty. Therefore, we
10 conclude that all these violations, even without the "filter" violation, justify the \$90,000
11 penalty.

12 XXVII.

13 Ecology's authority to issue orders is found in RCW 70.105.095. The Board reviews
14 such orders pursuant to RCW 43 21B.310(1).

15 In this case, we conclude that Order No. DE 90-E711 was appropriate in that it
16 directed WCI to come into compliance with all regulations and permit conditions that WCI had
17 violated. Moreover, requiring documentation of such compliance is reasonable and consistent
18 with RCW 70 105.130 and ch. 173-303 WAC. Finally, requiring that WCI conduct training
19 courses and document that such training occurred is reasonable in light of the violations posed
20 in this case.

21 XXVIII.

22 Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.
23 From these Conclusions of Law, the Board enters the following:

24
25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER

1
2 **ORDER**

3 Except for the alleged violation of filter storage, Notice of Disposition of Penalty No
4 DE E707 and Order No. DE E711 are affirmed.

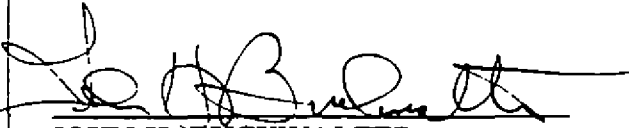
5 The \$90,000 penalty is affirmed.

6 DONE this 26th day of July, 1993.

7
8 **POLLUTION CONTROL HEARINGS BOARD**

9 
10 HAROLD S. ZIMMERMAN, Chairman

11 
12 RICHARD C. KELLEY, Member

13
14 
15 JOHN H. BUCKWALTER
16 Administrative Appeals Judge, Presiding